



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Darlena H,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024004204

Agency No. 200H-10N4-2023-15355

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 5, 2024, dismissing her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the reason discussed below, we affirm the Agency's final decision.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's complaint for untimely EEO contact pursuant to 29 C.F.R. § 1614.107(a)(2), or in the alternative, for failure to make a prima facie case of reprisal discrimination.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

During the relevant time, Complainant worked as a Nurse, with the EEO Counselor indicating that Complainant was a former employee of the Agency's Wilmington VAMC in Wilmington, Delaware.

Complainant filed for workers' compensation on November 8, 2022, which an Agency Workers' Compensation Specialist (hereafter WCS) processed. Complainant stated she learned in May 2023 that WCS allegedly incorrectly filed her workers' compensation paperwork (hereafter OWCP). Subsequently, Complainant filed for a reoccurrence of workers' compensation with Department of Labor on July 3, 2023.

Complainant emailed a supervisor on July 31, 2024, inquiring who to contact about filing an EEO complaint. Complainant's first contact with the Agency's EEO Office was not until August 4, 2023.

On September 6, 2023, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination in reprisal for prior protected EEO activity citing the incident of discrimination as "2022." The Agency accepted the following allegation for investigation:

Whether Complainant was discriminated against based on Reprisal (prior EEO activity), when as of July 5, 2023, and continuing, requested information had not been provided to Department of Labor related to her OWCP complaint.

The Agency conducted an investigation and issued a Report of Investigation as well as Notice of Right to File a Request for Hearing to Complainant.² Complainant requested a final agency decision.

On July 5, 2024, the Agency issued a final decision dismissing the formal complaint for untimely EEO contact. In the alternative, the Agency found that Complainant failed to make a prima facie case of reprisal discrimination.

² We note Complainant in her Notice of Appeal and brief, the Agency on appeal, and Report of Investigation refer to Complainant's complaint as both Agency No. 200H-10N4-2023-15355 and 200H-10N4-2023-15355 interchangeably.

The Agency noted by Complainant's own admission she learned of the alleged discriminatory act in May 2023.³ Complainant's first contact with the Agency's EEO Office was not until August 4, 2023, which is beyond the 45-day time limit. As such, the Agency dismissed her claim pursuant to 29 C.F.R. § 1614.107(a)(2). In the alternative, the Agency noted Complainant failed to make a viable claim of reprisal discrimination. The Agency found Complainant failed to show how WCS' alleged knowledge of Complainant's prior 2020 or 2021 EEO activity met the temporal proximity test to assume there is any type of nexus between that complaint and the Agency's actions.⁴

Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant alleges the discriminatory act did not occur in May 2023, when she learned of the error. Rather, Complainant claimed that the alleged discrimination was ongoing through July 2023 as she attempted to refile/update her OWCP claim with the Department of Labor. Complainant points to her emails starting on July 31, 2023, inquiring about filing an EEO complaint. Complainant states the date the Agency should look to is July 5, 2023, which was the last date she had to submit medical documentation to the Department of Labor.

In opposition to the appeal, the Agency maintains the timeline for Complainant to make timely EEO contact is from May 2023, and even assuming *arguendo*, Complainant learned of any OWCP error on May 31, 2023, she failed to make EEO contact within the 45-day time limit.

³ The Agency noted assuming *arguendo* the last day of May 2023 is when the alleged discriminatory event took place, Complainant should have contacted the EEO counselor no later than July 15, 2023. Instead, Complainant's first endeavor to contact someone regarding EEO was on July 31, 2023.

⁴ The Agency also noted that WCS properly handled the OWCP claim, and what remained outstanding in fall 2023 was the submission of an additional medical narrative, which must be provided by Complainant. The Agency noted Complainant also reached out to the Agency again in fall 2023 because she could no longer access her OWCP claim online because she set up her account using her VA email address, but she had since left Agency employment. The Agency assisted Complainant at that time as well.

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

The regulation set forth at 29.F.R. §1614.107(a)(2) allows an agency to dismiss a complaint that fails to comply with the applicable time limits contained in 29 C.F.R. §1614.105(a)(1), which, in turn, specifies that an aggrieved person must initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

29 C.F.R. §1614.105(a)(2) states that the agency shall extend the 45-day time limit when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

Here, by Complainant's own admission to the EEO Counselor and in her brief on appeal, the record discloses that the alleged discriminatory event occurred at the very latest on May 31, 2023. Complainant, however, did not initiate contact with an EEO Counselor until August 4, 2023, which is beyond the forty-five (45) day limitation period. Even assuming her emails to her supervisor inquiring how to file an EEO complaint constituted EEO contact, Complainant was still past the limitation period. On appeal, Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for initiating EEO Counselor contact.

Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact.

Moreover, the Commission notes on appeal and before the EEO Counselor, Complainant was challenging the processing of her OWCP claim. As to Complainant's claim regarding an error in a workers' compensation claim, an employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. See Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's proceedings, such as the grievance process, the workers' compensation process, or state or federal litigation. See Fisher v. Dep't of Def., EEOC Request No. 05931059 (July 15, 1994). The proper venue to raise challenges regarding any workers' compensation claim is within that process. There is no remedial relief available to Complainant on these matters through the EEO complaint process and Complainant's complaint in this regard fails to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). See Starr R. v. Dep't of Veterans Affairs, EEOC Appeal No. 20240022562024 (August 15, 2024).

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED for untimely EEO contact.

Because we affirm the Agency's final decision for the reason discussed above, we find it unnecessary to address its alternative analysis in the disposition of this case.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 8, 2025
Date